TABLE OF CONTENTS


| | | Page |
|---|---|---|
| I. | THE RECORD DEMONSTRATES THAT THE TRIAL COURT PREVENTED PETITIONER FROM STANDING MUTE AT THE GUILT PHASE BECAUSE THE COURT THOUGHT THAT SUCH A TACTIC WAS "IRRESPONSIBLE" AND WOULD LEAD TO PETITIONER'S CONVICTION, NOT BECAUSE IT THOUGHT PETITIONER WAS ATTEMPTING TO COERCE A CONTINUANCE OR DISRUPT THE PROCEEDINGS . . . . . | 2 |
| II. | NO COURT MAY, CONSISTENT WITH FARETTA, REVOKE A DEFENDANT'S RIGHT TO REPRESENT HIMSELF SIMPLY BECAUSE IT DETERMINES THAT THE DEFENDANT'S CHOICE OF TACTICS IS "INSINCERE . . . . . | 5 |
| CONCLUSION. . . . . | | 7 |




TABLE OF AUTHORITIES


| | Page(s) |
|---|---|
| Cases | |
| Faretta v. California, 422 U.S. 806 (1974). . . . . | 4, 6, 7 |

No. 93-5770

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ROBERT EDWARD STANSBURY

Petitioner,

vs.

STATE OF CALIFORNIA

Respondent.

# REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

In its response to the petition for a writ of certiorari, the State makes a number of assertions that are erroneous or unsupported by the record. This reply brief addresses those assertions.



## I. THE RECORD DEMONSTRATES THAT THE TRIAL COURT PREVENTED PETITIONER FROM STANDING MUTE AT THE GUILT PHASE BECAUSE THE COURT THOUGHT THAT SUCH A TACTIC WAS "IRRESPONSIBLE" AND WOULD LEAD TO PETITIONER'S CONVICTION, NOT BECAUSE IT THOUGHT PETITIONER WAS ATTEMPTING TO COERCE A CONTINUANCE OR DISRUPT THE PROCEEDINGS.

The State makes several factual representations that distort the record regarding petitioner's stated intent to stand mute. First, the State claims that petitioner "threatened to be obstructionist" and "attempted to obtain a continuance by use of coercion" (Resp., p. 7), and that he reconsidered his strategy of standing mute only "after the court denied his request for [a] continuance." Id., p. 8. This claim is not supported by the record. At no point during the proceedings in which the trial court threatened to revoke petitioner's pro per status did petitioner request a continuance. Indeed, petitioner specifically informed the court that he "ha[d] no motions for a continuance" (RT 4119), a point the trial court later acknowledged:

> [THE COURT]: What you've stated certainly is not grounds for a continuance. What you've stated is not grounds, although you haven't asked for one, is not grounds to continue, not reason enough for me not to appoint [assistant counsel] Daugherty to proceed in this matter." RT 4177 (emphasis added).[1]

1 Neither of the record citations provided by the State (Resp., p. 8) supports the State's argument that petitioner "threatened" to stand mute to obtain a continuance. At the (continued...)

Nor, as the State maintains (Resp., p. 7), did the trial court consider petitioner's stated intent to stand mute to be "obstructionist." To the contrary, shortly before warning petitioner that conducting his defense by nonparticipation would result in termination of his pro per status, the court expressly stated that petitioner had not done anything improper. RT 4122-4123; 4148; see Pet. Cert., pp. 7-9.

Second, the State misleadingly implies (Resp., p. 8) that the trial court's threats to terminate petitioner's self-representation were only tentative, and that petitioner ultimately changed his mind about participating in the case without further coercion from the court. The State claims that the trial court did no more than offer petitioner "the opportunity" to "think about" the tactics he would employ, and that petitioner "did not actually attempt to carry out his threat of remaining mute" because "he thought better of this threatened maneuver" after the trial court allegedly denied a continuance. Resp., p. 8.

This too is incorrect. As demonstrated by the portions of the record omitted from the excerpt quoted in the State's

---

1(...continued)
portion of the proceedings first cited by the State (RT 4101), petitioner informed the court that he intended "to allow the court and [the prosecutor] to proceed without [petitioner's] attempting to interfere," and the court responded that, by "not participat[ing] in this matter," petitioner would "run the risk of conviction." The other record citation provided by the State (RT 4164) contains the trial court's comment that appointing another attorney would require a continuance.



brief (Resp., p. 8), the trial court ruled unequivocally that petitioner would not be entitled to stand mute. The court simply added that, if petitioner could find "persuasive" authority justifying such a course of action (in addition to Faretta and the other cases he had already cited (see RT 4181)), the court might reconsider its ruling.[2]

---

2 "[THE COURT]: In any event, Mr. Stansbury, we've gone over this and over this and over this.

If you elect not to represent yourself, [assistant counsel] Mr. Daugherty will step in and do it. That's clear.

. . .

[PETITIONER STANSBURY]: Am I being informed that I cannot represent myself by not representing myself? Not representing myself is still representing myself.

. . .

I have made that election, and I have felt that's the best tactic to take at this time; that is a trial tactic on the part of myself as a pro per inmate.

[THE COURT]: I've indicated what I've said, Mr. Stansbury. I'm going to give you an opportunity to reflect on that. And I'll ask you again what your attitude is before we start on the voir dire.

But let us assume that I decide that maybe it is a legitimate tactic, and you were able to convince me sometime between now and then.

I want you to understand how high the roll of the dice is.

. . .

And at this point, I'm indicating that my attitude is if you persist in not expressing your desire not to present any kind of cross-examination of witnesses [sic], that is tantamount to a conviction, it is irresponsible, I believe, on my part to allow you to proceed with that tactic.

I'll give you an opportunity to respond to that if you can find some authority and convince me that I'm wrong.

[PETITIONER STANSBURY]: I believe all of the authorities--

(continued...)

Contrary to the State's insinuation, the trial court never retreated from its position that petitioner would not be allowed to stand mute because such a tactic was "tantamount to a conviction of [him]self." RT 4159, 4162. Petitioner abandoned his desired strategy only when the court, on the following day, issued its ultimatum that he would not be permitted to conduct his defense by nonparticipation:

> "[THE COURT]: [I]f you announce to me now that you're going to stand mute during this trial and not present any defense, not cross-examine any witnesses without considering what the evidence might be, then I am going to replace you, your pro per status and appoint Mr. Daugherty." RT 4253 (emphasis added).

## II. NO COURT MAY, CONSISTENT WITH FARETTA, REVOKE A DEFENDANT'S RIGHT TO REPRESENT HIMSELF SIMPLY BECAUSE IT DETERMINES THAT THE DEFENDANT'S CHOICE OF TACTICS IS "INSINCERE."

The State also argues that the state courts "merely determined that petitioner did not sincerely intend to stand mute as a defense" (Resp., p. 9), and it asserts that this "factual resolution" disposes of the issue presented for review. Resp., pp. 9, 10. This argument is flawed, both as a matter of fact and as a matter of law.

First, the trial court made no finding that petitioner was "insincere" in his choice of tactics, nor did the court find that petitioner's stated intent to stand mute constituted disruptive or obstructionist conduct. See Pet. Cert., pp. 7-8, 19-20. Indeed, the court expressly acknowledged, shortly after petitioner stated his intent to stand mute, that petitioner had not conducted himself improperly. RT 4122-4123, 4148. Although the California Supreme Court stated that the trial court "justifiably thought" that petitioner did not "sincere[ly]" desire to stand mute (Pet. Cert., Appx. A, p. 30) this determination is not supported by any factual finding by the trial court.

Second, and more fundamentally, the State's argument assumes the answer to the very question presented by the Petition; namely, whether a court may, consistent with Faretta v. California, 422 U.S. 806 (1974), force a self-represented defendant to present an affirmative defense because it does not believe in the "sincerity" or efficacy of standing mute as a defense tactic. If a court may revoke a defendant's Faretta rights on the ground that the defendant does not "sincerely" believe that standing mute is an effective defense tactic, as the California Supreme Court held here, then there is nothing to prevent a court from making the same determination about any defense tactic adopted by a self-represented defendant. Taking the

---

2(...continued)

> [THE COURT]: I'm indicating at this point what my ruling is.
>
> If you have some other authority that I must be compelled to accept your view, I want to see that authority. RT 4180-4181 (emphasis added).

California Supreme Court's reasoning to its logical conclusion, a court should rarely, if ever, grant a defendant the right to represent himself. Since "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts" (Faretta, 422 U.S. at 834), a court may validly determine that no defendant could "sincerely" believe that representing himself was the "best defense." Such an interpretation of Faretta would eviscerate the Sixth Amendment right of self-representation.

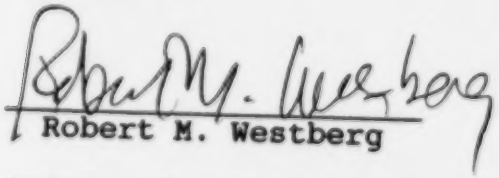
## CONCLUSION

For the reasons stated in the petition for a writ of certiorari and in this reply in support thereof, petitioner respectfully requests the Court to grant the writ of certiorari.

Dated: October 28, 1993.

Respectfully submitted,

ROBERT M. WESTBERG
Counsel of Record
DAVID S. WINTON
JOSEPH A. HEARST
PILLSBURY MADISON & SUTRO
225 Bush Street
San Francisco, CA 94104
(415) 983-1000

By 
Robert M. Westberg

Attorneys for Petitioner